THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case no: 561/04
Reportable

In the matter between:

MARY PATRICIA KING & 92 OTHERS
COLLEEN JUDITH VAN STRAATEN & 6 OTHERS
NAMCOAST (Pty) Ltd
C M TAPSON & 2 OTHERS Appellants

and

ATTORNEYS FIDELITY FUND BOARD OF CONTROL First respondent
MINISTER OF JUSTICE Second respondent

BEFORE: **HARMS, CAMERON, MTHIYANE, NUGENT and JAFTA JJA**

HEARD: **12 SEPTEMBER 2005**

DELIVERED: **29 SEPTEMBER 2005**

Constitution – alleged failure by National Assembly to fulfil a constitutional obligation – power to declare legislation invalid – different forms of statutory invalidity – invalidity alleged to derive from breach of constitutional obligation to facilitate public involvement in legislative process – section 167(4)(e) of Constitution precludes SCA and high courts from making order or entertaining application

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JUDGMENT

CAMERON AND NUGENT JJA:

[1] The appellants challenge the validity of a statute of Parliament. They base their challenge on s 59 of the Constitution, which says amongst other things that the National Assembly must 'facilitate public involvement in the legislative and other processes of the Assembly and its committees'.[1] They admit there was public consultation about the statute they challenge. But they say there was not enough. This they say renders the statute invalid. In the Grahamstown High Court, Chetty J dismissed their challenge. Though he considered that it was not the function of the courts to prescribe to Parliament the procedure it must follow in passing

1 Constitution s 59 [s 72 is identical in respect of the National Council of Provinces]:
Public access to and involvement in the National Assembly
(1) The National Assembly must –
(a) facilitate public involvement in the legislative and other processes of the Assembly and its committees; and
(b) conduct its business in an open manner, and hold its sittings, and those of its committees, in public, but reasonable measures may be taken –
(i) to regulate public access, including access of the media, to the Assembly and its committees; and
(ii) to provide for the searching of any person and, where appropriate, the refusal of entry to, or the removal of, any person.
(2) The National Assembly may not exclude the public, including the media, from a sitting of a committee unless it is reasonable and justifiable to do so in an open and democratic society.

legislation, he found that in fact there had been due compliance with the requirement of public involvement.

[2] This appeal is with his leave. It requires us to consider the nature of the obligation the Constitution imposes on Parliament to 'facilitate public involvement' in its processes. It also requires us to decide whether the Constitution empowers this court and the high courts to grant the appellants the order of constitutional invalidity they seek.

[3] The appellants – individuals, corporations and trustees numbering over 100, in four consolidated actions – claimed compensation from the first respondent, the Attorneys Fidelity Fund ('the Fund') for substantial losses they suffered after depositing monies in the trust account of a Port Elizabeth firm of attorneys, van Schalkwyks. They say the monies were to be used in a factoring scheme from which they were promised high returns. The scheme involved discounting bank guarantees relating to estate agents' commissions and

proceeds on property sales. They say that instead of holding the monies in trust for use in the scheme, the attorneys stole their money, entitling them to compensation from the Fund in terms of the Attorneys Act 53 of 1979.[2] But in 1998 Parliament amended this Act to preclude recovery of moneys deposited with an attorney not in the usual course of practice, but to invest on behalf of a client.[3] Most of the deposits took place after the amendment was enacted, and the Fund pleaded it in defence. The appellants countered by pleading the invalidity of the amendment Act for failure to comply with the constitutional requirement of public involvement.

[4] The Minister of Justice was joined as second defendant, and the parties agreed on a stated case, on the basis of which Chetty J separated the inquiry as to the Fund's liability from the other

2 In terms of s 26, the Fund must be applied inter alia for reimbursing persons who may suffer pecuniary loss as a result of 'theft committed by a practising practitioner … of any money or other property entrusted to him … in the course of his practice'.
3 Attorneys and Matters relating to Rules of Court Amendment Act 115 of 1998 s 1 and s 2, inserting s 47(1)(g), s 47(4)-(10) and s 47A into Attorneys Act 53 of 1979.

questions in the action, ruling as already mentioned in favour of the Fund and the Minister (who both in this court and in the court below made common cause with the Fund).

[5] According to the stated case, the Minister of Justice introduced the relevant Bill in the National Assembly on 30 January 1998 together with a memorandum on its objects, a clause by clause analysis, and a statement that the Department of Justice had consulted with a wide range of professional bodies representing attorneys and advocates. (These all supported the Bill.) The Bill was then referred to the National Assembly's Portfolio Committee on Justice. On 26 February 1998 the committee's chairman issued a media statement inviting 'any person or organisation' to make written representations on the Bill before 27 March 1998, or to indicate by that date whether they wished to give oral evidence.

[6] The Portfolio Committee held public hearings on 20 April and on 4 May 1998, after which it agreed to amendments to the Bill. In this form the Bill had its second reading on 30 July 1998, proceeded to the National Council of Provinces and thence back to the Assembly's Portfolio Committee, which considered the Council's amendments, whereafter the National Assembly on 6 November assented to it.

[7] The stated case records that articles relevant to the Bill were published in seven out of seventeen daily newspapers in South Africa. These could have reached just under half of the country's total daily newspaper readers of 4.6 million. There was no publication in weekly newspapers, or in the government or provincial gazettes. The government website in September and November 1998 did however carry versions of the Bill.

[8] In June 1995, the National Assembly adopted standing rules. These empowered its portfolio committees to summon persons to appear

and produce documents, and to receive representations from interested persons or parties and to permit oral evidence or representations. But it is common cause that when the amendment Act was passed, there was no general requirement that prior notice of the introduction of a Bill had to be published with an explanatory memorandum. This was introduced only later, when the National Assembly adopted more extensive and explicit rules.[4]

[9] These rules are still in force. They require that the memorandum accompanying a Bill at its introduction must contain a list of persons and institutions the executive consulted in preparing the Bill. In addition, a Bill may be introduced in the National Assembly only if prior notice of its intended introduction is published in the Government Gazette along with an explanatory summary (unless the Bill as it is to be introduced has itself been published there). And if

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4 In a letter included in the stated case, the Secretary to the National Assembly records that on 25 November 1999, the National Assembly adopted a report of the National Assembly Rules Committee dated 23 March 1999, which contained a comprehensive set of revised rules.

the draft Bill is published, the notice must contain an invitation to interested persons and institutions to submit written representations on it to the secretary to Parliament within a specified period. If the Bill has not been published for public comment, and the portfolio committee to which it is referred considers public comment necessary, it may through invitations, media statements, advertisements or other means invite the public to comment.

[10] Although these more extensive requirements were not in force when the amendment Act was adopted, the appellants expressly disclaimed any attack on the validity of the parliamentary rules that applied at the time, and made no claim that they were not complied with. They invoke the Constitution itself, and their complaint is that the National Assembly failed to do enough to fulfil its obligation to facilitate public involvement. They complain that though bodies who supported the legislation were informed and consulted, including the

organised legal profession, those whose interests the amendment detrimentally affected – investors like themselves who entrusted money for investment to attorneys – were, as counsel put it during argument, ‘left out in the cold’. This, they say, makes the legislation invalid. Parliament, they contend, must take ‘reasonable measures’ to ensure that all members of the public with an interest in legislation become aware that it is contemplated, and that they have a right to ‘say their say’ about it. If it fails to do this, its enactments lack the force of law.

[11] This case therefore does not raise questions concerning the content of or oversight over the rules that s 57 of the Constitution empowers Parliament to adopt. It focuses only on statutory invalidity alleged to arise from breach of a constitutional obligation. We are thus not asked to consider any questions concerning breach of a constitutional obligation falling short of this consequence.

[12] The main question is whether this court is precluded from pronouncing on the appellants' complaint. Though an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court, this court and the high courts have jurisdiction to 'make an order concerning the constitutional validity of an Act of Parliament' (s 172(2)(a)).[5] Section 167(4)(e) however allows only the Constitutional Court to 'decide that Parliament or the President has failed to fulfil a constitutional obligation'.[6] Since the appellants claim that the amendment Act is invalid because Parliament failed to fulfil an obligation in s 59 of the Constitution, the question is whether

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5 Constitution s 172(2)(a):
'The Supreme Court of Appeal, a High Court or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court.'
6 Constitution s 167(4):
'Only the Constitutional Court may –
(a) decide disputes between organs of state in the national or provincial sphere concerning the constitutional status, powers or functions of any of those organs of state;
(b) decide on the constitutionality of any parliamentary or provincial Bill, but may do so only in the circumstances anticipated in section 79 or 121;
(c) decide applications envisaged in section 80 or 122 [by at least one third of the members of National Assembly or 20% of the members of a provincial legislature for an order declaring all or part of an Act unconstitutional];
(d) decide on the constitutionality of any amendment to the Constitution;
(e) decide that Parliament or the President has failed to fulfil a constitutional obligation;
(f) certify a provincial constitution in terms of section 144.'

we are precluded from hearing their complaint on the ground that only the Constitutional Court can address the failure they allege.

[13] Before the hearing, this court invited the parties to make submissions on this issue, which was not argued before Chetty J. Both sides rightly submitted that the words 'constitutional obligation' in s 167(4)(e) must bear a restricted meaning. The Constitutional Court has said as much. In *President of the Republic of South Africa v South African Rugby Football Union*,[7] a case concerning the conduct of the President, the court pointed out that if s 167(4)(e) were construed as applying to all questions concerning constitutional validity of conduct of the President, it would conflict with s 172(2)(a). It therefore considered that when the two sections are read together a 'narrow meaning' should be given to 'fulfil a constitutional

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7 1999 (2) SA 14 (CC).

obligation' in s 167(4)(e), though it found it unnecessary to decide what that meaning should be.[8]

[14] The purpose of the constitutional provisions giving exclusive jurisdiction to the Constitutional Court is –

> 'to preserve the comity between the judicial branch of government, on the one hand, and the legislative and executive branches of government, on the other, by ensuring that only the highest Court in constitutional matters intrudes into the domain of the principal legislative and executive organs of State.'[9]

Since the Constitutional Court bears 'the responsibility of being the ultimate guardian of the Constitution and its values', s 167(4) vests it with exclusive jurisdiction in 'crucial political areas',[10] and it bears the

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8 1999 (2) SA 14 (CC) para 25.
9 *President of the Republic of South Africa v SARFU* 1999 (2) SA 14 (CC) para 29, dealing with s 172(2), but endorsed more broadly in relation to 'provisions of the Constitution which confer exclusive jurisdiction upon [the Constitutional Court] to decide certain constitutional matters' in *President of the Republic of South Africa v United Democratic Movement* 2003 (1) SA 472 (CC) para 20.
10 *President of the Republic of South Africa v South African Rugby Football Union* 1999 (4) SA 147 (CC) para 72.

duty 'to adjudicate finally in respect of issues which would inevitably have important political consequences'.[11]

[15] These are the clear premises. The question is whether they leave space for this court and the high courts to grant an order of statutory invalidity when the defect is alleged to arise from breach of a constitutional obligation. Though their approaches differed in the details, counsel on both sides contended that this court retained jurisdiction under s 172(2) to 'make an order' concerning the constitutional validity of the amendment Act, even when the source of the challenge was breach of a constitutional obligation. Appellants' counsel contended that the failure to fulfil a constitutional obligation was 'ancillary' to the question whether the statute was invalid. Counsel for the Fund contended that the jurisdiction conferred by s 172(2) prevails even when failure to fulfil a constitutional obligation is

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11 *President of the Republic of South Africa v South African Rugby Football Union* 1999 (4) SA 147 (CC) paras 72 and 73.

the source of the alleged invalidity: it is enough for jurisdiction that a statute is attacked for constitutional inconsistency.

[16] In our view these approaches impermissibly attenuate the jurisdictional exclusion in s 167(4). Although s 172(2) grants power to this court and the high courts 'to make an order concerning the constitutional validity of an Act of Parliament' the co-existence of the two provisions requires that we distinguish between different ways in which the Constitution envisages that statutes may be invalid. One case is where, even though a statute is validly adopted by Parliament, its provisions fall outside the scope of Parliament's legislative authority as defined in the Constitution, most notably by the Bill of Rights.[12] In such a case s 172(2) clearly empowers this court and the high courts to make an order of constitutional invalidity.

12 Constitution s 8(1):
'The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.'

[17] A purported statute may also be invalid because Parliament fails to enact it properly at all. This would happen if Parliament omits to observe the stipulations the Constitution prescribes concerning the manner and form in which legislation is to be adopted. Provisions of this kind include s 53, which requires that a majority of the members of the National Assembly must be present before a vote is taken on a Bill, and that all questions before the Assembly are decided by a majority of votes cast.[13] Although counsel for the appellants suggested that these provisions impose 'obligations' on Parliament in the sense envisaged in s 167(4)(e), this seems to us misconceived. Procedural requirements that are prerequisites to validity do not impose obligations. This is because constitutional limitations on legislative authority generally – albeit not invariably – derive from

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13 Constitution s 53(1):
'Except where the Constitution provides otherwise –
(a) a majority of the members of the National Assembly must be present before a vote may be taken on a Bill or an amendment to a Bill;
(b) at least one third of the members must be present before a vote may be taken on any other question before the Assembly; and
(c) all questions before the Assembly are decided by a majority of the votes cast.'

disabilities contained in rules that qualify the way in which the legislature may act: and it is a mistake to confuse legal limitations that arise from procedural prerequisites and from other limitations of legislative power with those that derive from the imposition of duties:

> 'A constitution which effectively restricts the legislative powers of the supreme legislature in the system does not do so by imposing (or at any rate need not impose) duties on the legislature not to attempt to legislate in certain ways; instead it provides that any such purported legislation shall be void. It imposes not legal duties but legal disabilities. "Limits" here implies not the presence of *duty* but the absence of legal power.'[14]

[18] A requirement as to form and manner for adopting legislation may however arise from an obligation that is imposed on the legislature. But the distinction between an obligation-derived prerequisite to validity and a purely capacity-defining formality should not be ignored, since this would be to overlook the variety and complexity of

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14 HLA Hart, *The Concept of Law* (Clarendon Press, Oxford, 1961) pages 68, 69 and 242, drawing on Wesley Newcombe Hohfeld *Fundamental Legal Conceptions* (1923).

the differing forms of disability and duty that the Constitution itself imposes. Should Parliament purport to adopt a Bill that fails to receive a majority of votes cast, it does not act in breach of a constitutional obligation, but fails to legislate at all. This court and the high courts thus have jurisdiction under s 172(2) to make an order of constitutional invalidity.[15] They decide not that Parliament has failed in its duty to fulfil an obligation (a 'crucial political' question), but only the more formal question that by omitting to observe the Constitution's prerequisites as to form and manner, Parliament has failed to produce a constitutionally valid statute.

[19] We accept that a third route might also lead to invalidity, where Parliament so completely fails to fulfil the positive obligations the Constitution imposes on it that its purported legislative acts are invalid. For while the legislative authority of the State in the national

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15 See *Harris v Minister of the Interior* 1952 (2) SA 428 (A), *Minister of the Interior v Harris* 1952 (4) SA 769 (A).

sphere of government is vested in Parliament, the exercise of this authority requires more than merely an assemblage of the members for the time being of those bodies debating and voting on proposed legislation. The Constitution requires that Parliament function in accordance with the principles of accountability, responsiveness and openness that constitute one of its founding values.[16] That founding value, so far as it relates to the conduct of the National Assembly, finds expression in the Constitution's requirement that its rules and orders for the conduct of its business must be made with due regard not only to representative democracy but also to participative democracy.[17] It also finds expression in the National Assembly's power to receive petitions, representations or submissions from any

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16 Constitution s 1(d) establishes as a founding value of the Republic of South Africa –
'Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.'

17 Constitution s 57(1)(b) provides that the National Assembly may make rules and orders concerning its business, 'with due regard to representative and participatory democracy, accountability, transparency and public involvement'.

interested persons or institutions,[18] its duty to facilitate public involvement in its legislative and other processes and of those of its committees,[19] its duty generally to conduct its business in an open manner and hold its sittings and those of its committees in public,[20] and its duty generally not to exclude the public or the media from sittings of its committees.[21]

[20] Those are all facets of a National Assembly that belongs to the people, although its formal business is conducted through their representatives, and it is to an Assembly functioning in this way that the Constitution entrusts the power to legislate.[22] Its antithesis is a body that separates itself from and excludes the public, is indifferent

18 Constitution s 56(d) provides that the National Assembly or any of its committees may 'receive petitions, representations or submissions from any interested persons or institutions'.
19 Constitution s 59(1)(a) provides that the National Assembly must 'facilitate public involvement in the legislative and other processes of the Assembly and its committees'.
20 Constitution s 59(1)(b) provides that the National Assembly must 'conduct its business in an open manner, and hold its sittings in public' but that reasonable measures may be taken to regulate public access and to provide for searching of persons.
21 Constitution s 59(2):
'The National Assembly may not exclude the public, including the media, from a sitting of a committee unless it is reasonable and justifiable to do so in an open and democratic society.'
22 Constitution s 42 (3):
'The National Assembly is elected to represent the people and to ensure government by the people under the Constitution. It does this by choosing the President, by providing a national forum for public consideration of issues, by passing legislation and by scrutinizing and overseeing executive action.'

to their participation and interests, and conducts its business concealed from the public eye. Were that ever to occur it would negate one of the essential pillars of the Constitution, with fundamental implications not only for Parliament's legitimacy, but for its legislative capacity. These consequences would follow, not because Parliament has failed to fulfil a capacity-defining procedural formality, but because it has disavowed the obligations the Constitution imposes on it.

[21] If, in violation of the constitutional obligation to conduct business in an inclusive and open manner, and to hold sittings in public, members of the National Assembly were to convene in secret or at an undisclosed venue, it is not hard to imagine that it might be held that this was not Parliament functioning as contemplated in the Constitution at all, and that consequently 'legislation' the persons so assembled purported to adopt lacked constitutional validity.

[22] The present case falls very far short of that. 'Public involvement' is necessarily an inexact concept, with many possible facets, and the duty to 'facilitate' it can be fulfilled not in one, but in many different ways. Public involvement might include public participation through the submission of commentary and representations: but that is neither definitive nor exhaustive of its content. The public may become 'involved' in the business of the National Assembly as much by understanding and being informed of what it is doing as by participating directly in those processes. It is plain that by imposing on Parliament the obligation to facilitate public involvement in its processes the Constitution sets a base standard, but then leaves Parliament significant leeway in fulfilling it. Whether or not the National Assembly has fulfilled its obligation cannot be assessed by examining only one aspect of 'public involvement' in isolation of others, as the appellants have sought to do here. Nor are the

various obligations s 59(1) imposes to be viewed as if they are independent of one another, with the result that the failure of one necessarily divests the National Assembly of its legislative authority.

[23] In our view it is only at that extreme – where Parliament has so renounced its constitutional obligations that it ceases to be or to act as the body the Constitution envisages and thus ceases to have legislative authority – that its purported enactments will not be valid. And the question whether that extreme has been reached – which is the prerequisite for the appellants' claim to succeed – is not one that this court or the High Courts are able to decide. That it would result in the invalidity of the National Assembly's purported acts is not sufficient in itself to vest this court with jurisdiction under s 172(2) because the invalidity in such a case is predicated upon the anterior question. Given the implications such a decision would entail, that

would be pre-eminently a 'crucial political' question, and s 167(4)(e) reserves it for only the Constitutional Court to make.

[24] It follows that the appropriate course for Chetty J, had the jurisdictional question been raised before him, would have been to strike the application from the roll because of the high court's lack of competence to hear the application. His order dismissing the application has in substance the same effect.

[25] In this court the appeal stands to be struck from the roll. The appellants asked that in that event they be spared the burden of the respondents' costs, but that cannot be. Although this court now applies the Constitutional Court's flexible principle that bona fide and reasonable litigants who raise genuine constitutional issues of broad concern should not be inhibited from asserting their rights by having

to pay the costs of governmental adversaries,[23] that principle cannot apply here. This was in essence a claim for private compensation, brought by disappointed investors who found that a statute obstructed their path to recompense. Their challenge to the validity of the statute involves the assertion of no essentially constitutional entitlement, and the normal rule as to costs must therefore apply. Although the Fund and the Minister were represented by two sets of two counsel, they requested the costs of only two.

[26] The appeal is struck from the roll with costs, including the costs of two counsel.

E CAMERON & RW NUGENT
JUDGES OF APPEAL

CONCUR:
HARMS JA
MTHIYANE JA
JAFTA JA

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23 See *De Kock v Van Rooyen* 2005 (1) SA 1 (SCA) para 30.